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Nos. 14-556, 14-562, 14-571 and 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, *et al.*, AND BRITTANI HENRY, *et al.*,
Petitioners,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*, *Respondents*.

VALERIA TANCO, *et al.*, *Petitioners*,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, *et al.*, *Respondents*.

APRIL DEBOER, *et al.*, *Petitioners*,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*,
Respondents.

GREGORY BOURKE, *et al.*, AND TIMOTHY LOVE, *et al.*,
Petitioners,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ET AL., IN SUPPORT OF PETITIONERS

Peake DeLancey Printers, LLC - (...

Alice O'Brien (Counsel of Record)
National Education Association
1201 Sixteenth Street, N.W.
Washington D.C. 20036

LYNN K. RHINEHART
H. CRAIG BECKER
American Federation of
Labor-Congress of
Industrial Organizations
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5397

ALICE O'BRIEN
(Counsel of Record)
JASON WALTA
KARI GREENWOOD
National Education
Association
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 822-7035

JUDITH A. SCOTT
NICOLE G. BERNER
Service Employees
International Union
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 730-7455

PATRICK J. SZYMANSKI
Change to Win
1900 L Street, N.W.
Washington, D.C. 20036
(202) 721-6035

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is submitted, with the consent of the parties,[1] on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); Change to Win (CTW); and the National Education Association (NEA) and 22 of its affiliated state education associations.[2] The AFL-CIO is a federation of 56 labor unions representing more than 12 million workers in the public and private sectors in every industry and level of government in the United States. CTW is a federation of three labor unions representing 4.3 million working men and women, including farm workers, food service workers, janitors, security guards, healthcare workers, truck drivers, and others employed in both the public and private sectors. NEA is a nationwide employee or-

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[1] Letters of consent from the Respondents are on file with the Clerk. Written consent of Petitioners has been submitted with this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] The state education associations that join in this brief are the Arizona Education Association, California Teachers Association, Colorado Education Association, Delaware State Education Association, Education Minnesota, Federal Education Association, Florida Education Association, Idaho Education Association, Illinois Education Association, Iowa State Education Association, Maryland State Education Association, Michigan Education Association, NEA-Rhode Island, New Jersey Education Association, New York State United Teachers, Ohio Education Association, Oregon Education Association, Pennsylvania State Education Association, South Dakota Education Association, Texas State Teachers Association, Vermont-NEA, and Washington Education Association.

ganization with 3 million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities.

Amici and our affiliated labor unions, which together represent every corner of the American labor movement, are dedicated to the equal and fair treatment of all workers. Protecting workers' economic rights—including those of workers who are lesbian, gay, bisexual, and transgender (LGBT)—is an important part of our collective mission. State laws that deny the right to marry to same-sex couples, by intention and design, ensure that those couples earn less money, pay higher taxes on their wages and benefits, and have available to them fewer valuable benefits than their married counterparts. *Amici*, therefore, stand united in our belief that such laws impermissibly relegate an entire class of working families to a lower stratum of economic security by irrationally depriving LGBT workers of the employment benefits extended to their coworkers. Furthermore, as *Amici*'s members who are educators and caretakers of children see first hand, these laws also inflict various emotional and psychological harms on children from LGBT families and on children who are themselves LGBT. These laws therefore deprive LGBT workers and their families of equal protection of the law.

SUMMARY OF ARGUMENT

Laws that deny same-sex couples the right to marry inflict on LGBT workers and their families a panoply of concrete economic injuries. Because marital status plays a key role in determining eligibility for a myriad

of workplace benefits, rights, and privileges, as well as the level of taxation of many benefits, these laws deprive LGBT workers and their families of significant economic protections associated with employment that are enjoyed by their married coworkers. The resulting economic injuries can be quantified in the dollars unmarried LGBT workers are forced to spend because of higher costs and taxes, and in the value of publicly and privately provided benefits to which they are denied access.

Additionally, *Amici* members include millions of Americans who work directly with children of LGBT parents and children who themselves may be questioning their own gender identities or sexual orientation. As teachers, ancillary school employees, and childcare providers, our members witness every day the ways in which these discriminatory laws stigmatize children and parents alike and inflict psychological and emotional harms on children in the school and childcare environments.

For these reasons, among others, *Amici* are steadfast in their view that the Court must find for the Petitioners on both questions presented and conclude that the Fourteenth Amendment requires states to license marriages for same-sex couples and to recognize lawful marriages of same-sex couples performed out-of-state.

ARGUMENT

LGBT workers and their families are an integral part of the fabric of our society, polity, and workforce. Based on the 2012 Gallup Survey, approximately 3.5% of the U.S. population, nearly 8.5 million adults, self-

identify as LGBT.[3] Approximately 82% of individuals in same-sex couples are in the labor force, compared with 69% of individuals in different-sex couples.[4] An estimated 125,000 same-sex couples are raising an estimated 220,000 children in the U.S.[5] The creation and makeup of these families is diverse: some same-sex couples choose to use assisted reproductive methods to have a child that is biologically related to one of the partners, some couples have children from previous relationships (either biological or adoptive), and some couples choose to adopt children to begin a family together.

These families—like the families of married, different-sex couples throughout the nation—aspire to certain goals. They strive to support one another emotionally and financially, to live healthy and dignified lives, and to raise children to be full and productive members of society. In other words, they strive for "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[6]

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[3] Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being LGBT in America* 4 (Sept. 2014), *available at* http://www.lgbtmap.org/file/paying-an-unfair-price-full-report.pdf.

[4] *Id.* Many LGBT individuals work in low-wage or minimum wage jobs. Approximately 21% of LGBT workers make less than $12,000 in annual income. *Id.* at 6.

[5] Gary J. Gates, *LGBT Parenting in the United States* 3 (Williams Institute, UCLA School of Law, Feb. 2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

[6] *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

Ohio, Michigan, Tennessee, and Kentucky have laws in place that deny same-sex couples the right to marry.[7] As a consequence, committed same-sex couples in these states cannot enter "the most important relation in life"[8]—a relationship that implicates the fundamental rights of liberty,[9] privacy,[10] and intimate choice and association.[11] They are denied the innumerable rights and obligations conferred by marriage that are crucial to the economic and social wellbeing of working people and their families.[12] And, they are denied the "status of immense import" that "en-

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[7] Mich. Const. art. I § 25 ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."); Ky. Const. § 233A ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky."); Ohio Const. art. XV § 11 ("Only a union between one man and one woman may be a marriage valid in or recognized by this state."); Tenn. Const. art. XI § 18 ("Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee.").

[8] *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888)).

[9] *Id.*

[10] *Griswold*, 381 U.S. at 486.

[11] *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

[12] *See United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (noting that denial of full marriage rights leaves same-sex couples "burdened . . . in visible and public ways . . . from the mundane to the profound").

hance[s] the recognition, dignity, and protection" of their families.[13]

I. Denying Same-Sex Couples the Right to Marry Inflicts Significant Economic Injury on LGBT Workers and Their Families

Laws that deny same-sex couples the right to marry deprive LGBT workers and their families of significant economic benefits associated with employment.[14] These benefits include access to affordable healthcare, programs that ease the economic disruption

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[13] *Id.* at 2692.

[14] *See Baskin v. Bogan*, 766 F.3d 648, 658-59 (7th Cir.) (listing employment benefits of marriage that are denied to same-sex couples under such laws, including survivor benefits for the spouse of a public safety officer killed in the line of duty, access to enrollment in a spouse's health insurance plan, healthcare benefits for spouses of federal employees, and social security spousal and surviving-spouse benefits), *cert. denied*, 135 S. Ct. 316 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1215 (10th Cir.) (observing that laws withholding marriage from same-sex couples "raise[] the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses" and "den[y] or reduce[] benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security") (quoting *Windsor*, 133 S. Ct. at 2695), *cert. denied*, 135 S. Ct. 265 (2014). *See also Latta v. Otter*, 771 F.3d 456, 476, 473 (9th Cir.) (noting that such laws "impose profound legal, financial, social and psychic harms on numerous citizens of these states" and effectively "[d]eny[] children resources"), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Dec. 30, 2014) (No. 14-765); *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir.) (noting that such laws "harm the children of same-sex couples" by "robbing them of the stability, economic security, and togetherness that marriage fosters"), *cert. denied*, 135 S. Ct. 308 (2014).

caused by illness or death, and arrangements that allow workers to plan for retirement and old age.[15] As a result of the economic disadvantages these laws create, same-sex couples are more likely to live in poverty than their different-sex counterparts.[16]

A. Denying same-sex couples the right to marry significantly impairs LGBT workers' access to employer-provided healthcare benefits for their partners and families

Employer-provided healthcare benefits are the most common source of medical insurance for working Americans and their families. Nationwide, approximately 60% of the population below the age of 65

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[15] As we will explain in greater detail below, this Court's decision in *Windsor* striking down the federal Defense of Marriage Act cleared the way for conferring some *federal* spousal benefits to same-sex couples who are married in a state that recognizes such marriages, even if they reside in a state that does not. *See infra* notes 27, 28, 40, 52. But it is far from true that same-sex couples can avoid the economic hardships of their own state's ban simply by traveling to another state to marry. First, the availability of some federal benefits still depends on whether a marriage is recognized in the state of residence. *See infra* note 42. Second, the administrative decisions and guidance that make some federal spousal benefits currently available to same-sex married couples based on the state of celebration could be withdrawn or reversed, leaving those couples in a tenuous economic position. And, finally, many of the benefits that flow from marriage are conferred by state, rather than federal law. *See, e.g., infra* notes 22, 29, 45.

[16] In states without marriage equality, same-sex couples raising children have approximately $8,912 less in annual household income than their different-sex counterparts. Movement Advancement Project, *supra* note 3, at ii.

receives medical coverage through employer-sponsored insurance—more than half of which receive coverage as a spouse or dependent of the policyholder.[17] However, due in part to discriminatory state laws that complicate, penalize, or flatly prohibit full family coverage, same-sex couples are more likely to be uninsured than married different-sex couples.[18] As a result, many same-sex couples are forced to rely on coverage available through public assistance or go without health insurance entirely.[19]

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[17] John Holahan & Megan McGrath, *Henry J. Kaiser Family Foundation Issue Brief: As the Economy Improves, the Number of Uninsured Is Falling But Not Because of a Rebound in Employer Sponsored Insurance* 13 (Mar. 2014), *available at* https://kaiserfamilyfoundation.files.wordpress.com/2014/03/8560-as-the-economy-improves-the-number-of-uninsured-is-falling1.pdf; Julie Sonier et al., *State-Level Trends in Employer-Sponsored Health Insurance* 5 (Apr. 2013), *available at* http://www.rwjf.org/content/dam/farm/reports/reports/2013/rwjf405434.

[18] As of 2014, 55% of firms in the United States offered health benefits to at least some of their employees, but only 39% of those firms offer coverage to same-sex domestic partners. Garry Claxton et al., *Employer Health Benefits 2014 Annual Survey* 38 (2014), *available at* http://files.kff.org/attachment/2014-employer-health-benefits-survey-full-report; *see also* Agency for Healthcare Research and Quality, *Lesbian, Gay, Bisexual, and Transgender Populations: Selected Findings From the 2011 National Healthcare Quality and Disparities Report* (2011), *available at* http://www.ahrq.gov/research/findings/nhqrdr/nhqrdr11/lgbt.html.

[19] Usha Ranji et al., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S.* 8 (Jan. 2014) ("[O]f the close to 5.5 million LGBT individuals estimated to have incomes under 400% of the federal

Denying same-sex couples the right to marry, and the effect that has on access to health care coverage, can have consequences for the wellbeing of the entire family. Based on average healthcare costs for a family of four, an LGBT worker denied family health-benefits coverage by his or her employer in 2013 paid about $3,000 more per year for family health insurance than a different-sex married couple with access to employer-provided insurance.[20] The lack of spousal coverage often forces individuals to remain in the workforce when they might otherwise choose to stay home or work part-time in order to care for children or for elderly or infirm family members. Even when non-covered partners qualify for coverage through their own employers, the cost of the additional premium payments is substantial. Plus, one partner's employer-provided coverage may entail higher premiums or out-of-pocket costs than those charged by the other partner's benefit plan. These additional expenses impose significant burdens on working families and con-

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poverty level (FPL), one in three are uninsured currently and more than two-thirds have been uninsured for more than two years. Among this group, LGBT individuals with insurance are less likely than individuals in the general population to get insurance through their employer and more likely to be enrolled in Medicaid."), *available at* http://kff.org/disparities-policy/issue-brief/health-and-access-to-care-and-coverage-for-lesbian-gay-bisexual-and-transgender-individuals-in-the-u-s/. States that deny same-sex couples the right to marry generally are not obligated to recognize lawful same-sex marriages performed in other states when assessing eligibility for federal health benefits, such as Medicaid or the Children's Health Insurance Program. *See* Movement Advancement Project, *supra* note 3, at 41.

[20] *See* Movement Advancement Project, *supra* note 3, at 39.

sume resources that might otherwise be invested elsewhere, such as in college funds or retirement savings.

1. Denying same-sex couples the right to marry impedes public-sector LGBT workers' access to healthcare coverage for their partners and the dependent children of their partners

Nearly all public-sector employees are offered medical coverage,[21] often with a "family plan" option for extending coverage to their spouses and dependent children. In states that deny the right to marry to same-sex couples, however, LGBT public employees may be prevented from extending these benefits to their partners or even to their children (if they are not legally recognized parents).[22] For example, petitioners Valeria Tanco and Sophy Jesty sought to enroll themselves in a family health insurance plan through their employer, the University of Tennessee. However, the university denied their request and required Ms. Tanco and Ms. Jesty to enroll individually because their marriage was not legally recognized under Tennessee law.[23]

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[21] U.S. Bureau of Labor Statistics, *Employee Benefits in the United States* 2 (July 25, 2014) (noting that approximately 99% of full-time state and local government employees are offered medical and retirement benefits), *available at* http://www.bls.gov/ncs/ebs/sp/ebnr0020.pdf.

[22] *See, e.g., Nat'l Pride at Work v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2008) (holding that the Michigan marriage amendment prohibits public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners).

[23] Complaint, *Tanco v. Haslam*, (M.D. Tenn., filed Oct. 21, 2013) (No. 13-1159).

At best, certain public employers may choose to offer a health insurance plan that includes an option for coverage of a domestic partner.[24] However, public employers are not obligated to provide such coverage, and, even where such coverage is provided, the employee must still pay for these premiums on an after-tax basis, with the additional costs added to the employee's taxable income.[25]

The inability of LGBT workers to extend benefits to their families results in obvious and significant economic hardship, as the non-covered partners and children must obtain coverage elsewhere (possibly by purchasing costly or inferior private insurance) or go without coverage altogether. The lack of full-family coverage can also force individuals to remain in the workforce when they might otherwise choose to stay home or work part-time in order to care for children or for elderly or infirm family members.

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[24] *See, e.g.*, *City of Knoxville Guide to Your Benefits* 4 (2015) (providing that "[t]he City of Knoxville covers domestic partners if proof of financial interdependence can be provided"), *available at* http://www.cityofknoxville.org/benefits/enrollment/guide.pdf.

[25] *Id.* ("While the employee's portion of the premium is deducted from your paycheck on a pre-tax basis, any additional premium you are required to pay to cover your domestic partner will be deducted from your paycheck on an after-tax basis, and the additional cost of the plan to add your domestic partner or their children will be added to your taxable income, provided they are not claimed as a tax dependent or legally married."); *see also infra* notes 30 & 31.

2. Denying same-sex couples the right to marry results in unequal tax treatment of LGBT workers in both the public and private sector who receive employer-provided healthcare benefits

Although many employers provide healthcare benefits to only employees' legally recognized spouses and children, some employers *do* extend those benefits to the families of LGBT employees who are unable to marry. Employers who take this step may wish to attract and retain valued employees, they may be motivated by a basic sense of fairness and a desire to promote employee morale through a commitment to non-discrimination, or they may agree to provide these benefits as part of the give-and-take of collective bargaining with a union committed to equality for all the employees it represents.

The Internal Revenue Code allows employees to exclude from gross income the value of employer-provided health insurance coverage for spouses and children.[26] This exclusion represents a significant tax advantage because the fair-market value of employer-provided healthcare insurance would otherwise be taxable as income. In the wake of the Supreme Court's decision in *Windsor* striking down the federal Defense of Marriage Act, the Internal Revenue Service has released guidance explaining that same-sex partners will be treated as "spouses" for purposes of federal tax law if they have validly married in a state whose laws authorize the marriage of two individuals of the same sex, even if the married couple is domiciled in a state that

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[26] 26 U.S.C. §§ 105, 106(a), 152; 26 C.F.R. § 1.106-1.

denies the right to marry to same-sex couples.[27] Such treatment does not, however, extend to a couple whose relationship has not been recognized as a legal marriage under state law.[28] Nor, for that matter, does it extend to *state* taxation of fringe benefits such as health insurance in states that do not recognize marriage between same-sex couples.[29]

Thus, a state's denial of the right to marry operates to prohibit same-sex couples from receiving this valuable tax benefit, and forces both employers and employees to treat the fair-market value of coverage as taxable income.[30] This is true even when an employer provides coverage under a family plan, in which the addition of a beneficiary would not add to the premium cost. In that circumstance, an employee who elects such coverage for her same-sex partner and/or children will be taxed on the imputed fair-market value of that coverage, unless the individuals covered qualify as tax dependents through independent means.[31]

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[27] *See* I.R.S. Rev. Rul. 2013-17 (Aug. 30, 2013).

[28] *Id.*; *see also* I.R.S. Notice 2013-61 (Sept. 24, 2013) (applying the Service's place-of-celebration rule to the taxation of employer-provided benefits extended to an employee's same-sex spouse).

[29] James Angelini & Jason Peterson, *The Federal and State Taxation Of Domestic Partner Benefits*, 62 STATE TAX NOTES 377, 383-85 (Nov. 2011) (analyzing state taxation of fringe benefits for non-married LGBT partners), *available at* http://taxprof.typepad.com/files/62st0377.pdf.

[30] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200339001 (June 13, 2003); I.R.S. Rev. Rul. 2013-17; I.R.S. Notice 2013-61.

[31] I.R.S. Priv. Ltr. Rul. 9850011 (Sept. 10, 1998).

The health insurance–related tax burdens imposed on same-sex couples that cannot marry in their home state do not end there. Married couples may generally pay for health insurance premiums incurred on behalf of themselves and certain family members with pre-tax dollars, thereby both lowering the actual cost of coverage and reducing their taxable income.[32] Married couples may also make contributions to a "cafeteria" plan on behalf of a spouse, or be reimbursed on a pre-tax basis for spousal medical expenses from a health savings account or flexible savings account.[33]

The denial of the right to marry to same-sex couples prevents them from using these tax-saving mechanisms, which significantly increases the cost of benefits for these employees and can even force them into a higher tax bracket. For example, if an employee married to a different-sex spouse and an employee with a same-sex partner each earn $50,000 a year and get $6,901 in health benefits for their families, the employee with a same-sex partner will pay about $3,417 more in income and payroll taxes because she cannot claim her same-sex partner as a dependent.[34] And, although a private employer can provide its LGBT employees a stipend to offset that additional tax

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[32] 26 U.S.C. §§ 105(b), 106(a).

[33] *See id.* § 125(f); 26 C.F.R. § 1.106-1.

[34] Movement Advancement Project, *supra* note 3, at 40-41; *see also* M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits* 7-8 (Dec. 2007), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf.

liability,[35] such "grossing up" is costly for an employer—in terms of both the actual cost of the stipend and the additional legal and accounting expenses needed to properly carry out the arrangement.

Because of that added cost, employers have less incentive to provide these vital benefits. They may pass the additional costs for providing these benefits directly to the affected employees. That was the case for Petitioners Gregory Bourke and Michael DeLeon, who both work for private employers that offer same-sex partner health insurance. They both would have to pay additional fees to add their same-sex partner, whereas a similarly situated different-sex married couple would not.[36]

3. Denying same-sex couples the right to marry prevents LGBT workers from accessing guarantees of uninterrupted healthcare coverage for their partners and families

For those LGBT workers who are able to obtain employer-provided health coverage for their families, they still may lack access to important federal guarantees of uninterrupted healthcare coverage that would otherwise result from certain significant life events. In the past 30 years, Congress enacted two landmark statutes—the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)[37] and the

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[35] *See* I.R.S. Priv. Ltr. Rul. 200108010 (Nov. 17, 2000).

[36] *See* Amended Complaint, *Bourke v. Beshear* (W.D. Ky., filed Aug. 16, 2013) (No. 13-00750).

[37] Pub. L. No. 99-272, 100 Stat. 82.

Health Insurance Portability and Accountability Act of 1996 (HIPAA)[38]—that were intended to give workers and their families greater healthcare security and continuity. However, same-sex couples living in states where they cannot marry are largely excluded from these statutory protections.

COBRA requires public and private employers with twenty or more employees to offer continued healthcare coverage, at group rates, for a defined period of time to employees and their dependents under certain circumstances, such as termination, reduction in employment hours, or death of the employee.[39] The aim of this requirement is to maintain the portability of healthcare coverage and to ensure that employees who change jobs or become unemployed do not suffer an immediate loss of group coverage for themselves and their families. Without the right to marry, however, covered employers are not required to continue coverage for same-sex partners who cannot, but would otherwise, marry the covered employee.[40]

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[38] Pub. L. No. 104-191, 110 Stat. 1936.

[39] 29 U.S.C. §§ 1161-69.

[40] *See* 29 U.S.C. § 1167(3) ("qualified beneficiary" defined as covered employee's "spouse" or "dependent child"). Much like the Internal Revenue Service has done in the wake of *Windsor*, *see* notes 27 & 28 *supra*, the Department of Labor recently issued guidance indicating that the term "spouse" for purposes of Title I of ERISA (which includes COBRA) would extend to those in marriages between same-sex couples celebrated in a state where such unions are lawful, but the term would not embrace a couple's relationship that has not been denominated as a marriage under state law. *See* U.S. Dep't of Labor Technical Release No. 2013-04 (Sept. 18, 2013).

Congress likewise designed HIPAA to promote portability of healthcare coverage and ease transfers of coverage in the event of a change in family circumstances. In particular, HIPAA allows an employee to add a spouse to his or her healthcare plan immediately upon marriage or in the event of certain special circumstances, such as a loss of the spouse's existing coverage resulting from termination of employment.[41] Once again, denying the right to marry prevents same-sex couples from taking advantage of this protection, thereby placing them at an increased risk of loss of coverage.

B. Denying same-sex couples the right to marry impedes the access of LGBT families to critical programs that protect married workers and their families in the event of illness, workplace injury, or death

Programs that provide monetary and other assistance in the event a worker becomes ill, is injured, or dies are often a lifeline that prevents families from falling into economic ruin. The best-known of these programs is Social Security, which provides benefits to the spouses and children of workers who die or become disabled. Many workers are also guaranteed the right to unpaid leaves of absence to care for a sick spouse or child. Without the right to marry, however, these benefits are denied to same-sex couples.[42]

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[41] *See* 26 U.S.C. § 9801(f); 26 C.F.R. § 54.9801-6.

[42] Unlike some other federal spousal benefits, those administered by the Social Security Administration are not available to same-sex couples who were lawfully married in one state but reside in another state that does not recognize such marriages.

1. Denying same-sex couples the right to marry precludes the families of LGBT workers from receiving Social Security disability and survivor benefits

The Social Security system provides a variety of disability and survivor benefits to spouses and children of covered workers. In particular, it provides an ongoing benefit to spouses and children of eligible workers who have become disabled and cannot work.[43] Likewise, in the event of an eligible worker's death, Social Security provides a survivor's benefit to spouses and children of the worker.[44] This provision—which allows the spouse to receive the greater of either her own Social Security retirement benefit or the deceased worker's Social Security benefit—is particularly beneficial to a surviving spouse who earned less income.

Partners in same-sex couples who cannot marry under the laws of their home states are prevented from receiving these Social Security disability and sur-

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See Memorandum from the Attorney General to the President, Implementation of *United States v. Windsor* 3 (June 20, 2014) (explaining that the Social Security Administration is "required by law to confer certain marriage-related benefits based on the law of the state in which the married couple resides or resided, preventing the extension of benefits to same-sex married couples living in states that do not allow or recognize same-sex marriages"), *available at* http://www.justice.gov/iso/opa/resources/972201462010393090478 5.pdf. The same is true of spousal benefits administered by the Department of Veteran Affairs. *See id.*

[43] 42 U.S.C. §§ 402(b)-(d).

[44] *Id.* §§ 402(e), (f). Surviving spouses or children may also be eligible for a "Lump-Sum Death Benefit." *Id.* § 402(i).

vivor benefits. And because some state laws also prevent the adoption of children by both partners in a same-sex couple,[45] those children could not receive such benefits if the non-legally recognized parent—and perhaps the primary breadwinner for the family—were the one to die or become disabled.[46]

The value of these benefits is substantial. In 2011, the spouse of a disabled worker received an average monthly benefit of $299, and the child of a disabled worker received an average monthly benefit of $322.[47] Thus, a family of four, including a different-sex spouse and two children, would have received an annual amount of $11,316 in benefits that would have been denied to an unmarried same-sex couple if the disabled worker was not recognized as the legal parent of their child.[48] Similarly, in 2011, the average monthly benefit was $884 for the spouse of a deceased worker and $783 for a child of a deceased worker, which annually would total more than $29,000 the family of a deceased LGBT worker would be deprived of as a result of the state's denial of the right to marry.[49]

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[45] *See, e.g.*, Mich. Comp. Laws § 710.24 (specifying that adoption is permissible for a single individual or a "person, together with his wife or her husband").

[46] *See* 42 U.S.C. § 416(e) (defining "child" for the purpose of Social Security benefits to mean a biological child, adopted child, or stepchild).

[47] Movement Advancement Project, *A Broken Bargain: Discrimination, Fewer Benefits and More Taxes for LGBT Workers* 88 (June 2013), *available at* http://www.lgbtmap.org/file/a-broken-bargain-full-report.pdf.

[48] *Id.*

[49] *Id.*

2. Denying same-sex couples the right to marry precludes LGBT workers' access to leave under the Family and Medical Leave Act

Similarly, the Family and Medical Leave Act (FMLA) entitles employees of qualified employers to as many as twelve weeks of unpaid leave to care for a spouse who has a serious health condition.[50] The FMLA is intended "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."[51] However, employers are not required to provide FMLA leave to workers in same-sex couples who cannot marry and who need time off from work to care for a seriously ill partner or child to whom the worker is not the legally recognized parent.[52] Without the ability to take leave from work to care for a sick partner or child, LGBT workers may be at greater risk of getting fired if their partner or a partner's child becomes ill.[53]

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[50] 29 U.S.C. § 2612(a).

[51] *Id.* § 2601(b)(1).

[52] Currently, the Department of Labor looks to the employee's state of residence to determine spousal status for purposes of entitlement to FMLA leave. *See* U.S. Dep't of Labor, *Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act* (Aug. 2013). But, under regulations that become effective March 27, 2015, the Department will begin looking to the state of celebration. *See* Definition of Spouse under the Family Medical Leave Act, 80 Fed. Reg. 9989, 10000-01 (Feb. 25, 2015) (to be codified at 29 C.F.R. pt. 825).

[53] Movement Advancement Project, *supra* note 3, at 46.

C. Denying same-sex couples the right to marry imposes significant burdens on them as they plan for retirement

1. Denying same-sex couples the right to marry restricts their access to Social Security retirement and Medicare benefits designed to protect lower-earning spouses

Social Security and Medicare are the foundation of our nation's commitment to ensuring that older workers and their spouses can retire with a modicum of dignity and stability. About 86% of older adults in the United States receive income from Social Security,[54] and 93% receive healthcare coverage through Medicare.[55] The inability of same-sex couples to marry under the laws of their home states, however, deprives them of access to certain benefits under these programs and thereby places them at greater risk of economic insecurity in retirement.

Upon retirement, a married worker covered by Social Security may opt to receive the larger of either her own retirement benefit or one-half of her covered spouse's benefit, by adding a spousal benefit to the married worker's lower benefit.[56] Social Security also permits married persons at full retirement age to elect

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[54] *Id.* at 51.

[55] Administration on Aging, U.S. Department of Health and Human Services, *A Profile of Older Americans: 2012* 14 (2012), *available at* http://www.aoa.gov/Aging_Statistics/Profile/2012/docs/2012profile.pdf.

[56] 42 U.S.C. § 402.

to receive only the spousal benefit, while at the same time continuing to accrue delayed retirement credits in their own accounts.[57] Yet, these benefits are unavailable to same-sex couples who reside in states that deny them the right to marry, even if they were lawfully married in another state that recognizes such unions.[58] The denial of these spousal retirement benefits could cost a same-sex couple as much as $15,852 a year.[59]

Moreover, when one spouse receiving Social Security retirement benefits dies, the surviving spouse is entitled to receive the deceased spouse's benefits if they would be greater than those of the surviving spouse.[60] This provision allows a lower-earning spouse to maintain her standard of living in the event the higher-earning spouse dies first. In 2014, the maximum value of this benefit for those who retire at the normal age of 65 is $31,704.[61] Yet, once again, this ben-

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[57] Soc. Sec. Admin., *Social Security Retirement Benefits* 9 (July 2012), *available at* http://www.ssa.gov/pubs/EN-05-10035.pdf.

[58] *See supra* note 42.

[59] *See* Movement Advancement Project, *supra* note 3, at 53 (based on a retirement age of 65 in 2014).

[60] 20 C.F.R. § 404.335.

[61] *See* Movement Advancement Project, *supra* note 3, at 53; *see also* Naomi G. Goldberg, *The Impact of Inequality for Same-Sex Partners in Employer-Sponsored Retirement Plans* 9 (Oct. 2009) (finding that same-sex couples unable to claim spousal benefits lose an average of $5,700 in annual Social Security income), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Goldberg-Retirement-Plans-Report-Oct-2009.pdf.

efit is unavailable to same-sex couples who reside in states that deny them the right to marry, even if they lawfully married in another state. For these couples, when the higher-earning partner dies first, the surviving partner loses the higher earner's Social Security payment and continues to receive only her own (lower) payment, if she is eligible to receive any payment to begin with.

This would have been the case for Midori Fujii, who sued to invalidate Indiana's ban on marriage between same-sex couples. Midori's partner, Kristie Kay Brittain, was the family's primary breadwinner until she passed away from ovarian cancer. Had the Seventh Circuit not struck down Indiana's ban, Midori would not have been able to receive Kristie's social security benefits when she turns 65.[62]

The denial of the right to marry to same-sex couples also imposes comparable restrictions on those seeking Medicare coverage. Individuals generally become eligible for Medicare coverage by meeting the same work-history criteria necessary to receive Social Security retirement benefits.[63] The spouses of those individuals are also automatically eligible for Medicare benefits, even if they lack the work history to become eligible in their own right.[64] Same-sex couples who are unable to marry, however, must qualify for Medicare independently of one another.

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[62] Complaint, *Midori Fujii v. State of Indiana*, (S.D. Ind., filed Mar. 14, 2014) (No. 14-404).

[63] 42 U.S.C. §§ 426(a)-(b), 1395c; 42 C.F.R. § 406.5(a).

[64] 42 U.S.C. § 426(a).

Taken together, the inability to access Social Security and Medicare programs greatly increases the economic insecurity of same-sex couples in retirement. Moreover, these restrictions have the perverse effect during those couples' working lives of discouraging one partner from caring for their children on a full-time basis or forgoing employment to care for sick or disabled family members.

2. Denying same-sex couples the right to marry impedes their access to equal rights and benefits under private pension plans

The denial of the right to marry also disadvantages same-sex couples and their families with respect to benefits under private retirement plans. Many private employers provide traditional pension plans—*i.e.*, "defined benefit plans"—to their employees as a benefit of employment. Approximately 31% of retirees 65 and older receive at least part of their income from a pension plan.[65] Under these plans, employees, upon retirement, are guaranteed fixed monthly payments for life and often for the lives of their spouses. These plans confer several tax deduction and income-deferral benefits on both employers and employees, provided the plans conform to certain requirements of federal tax law. Among those prerequisites are numerous nondiscrimination rules, many of which are designed to protect spouses of covered employees. Without the right to marry in their home states, however, LGBT workers do not have these protections.

ERISA and the Internal Revenue Code require de-

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[65] Movement Advancement Project, *supra* note 3, at 56.

fined benefit plans and certain other pension plans to provide automatic benefit payments to a surviving spouse of a plan participant who dies prior to retirement, unless the participant elects another payment form and the participant's spouse consents to that election.[66] The denial of the right to marry precludes surviving same-sex partners from receiving these benefits.

For example, in *Cozen O'Connor, P.C. v. Tobits*, Plaintiff Jennifer Tobits sought to recover benefits under her spouse's ERISA-governed retirement plan after her spouse passed away.[67] A federal district court held that Ms. Tobits' marriage was recognized under Illinois law, and that Ms. Tobits was thus entitled to spousal recovery under her deceased spouse's retirement plan. In states that deny the right to marry to same-sex couples, however, such recovery may not be possible.

Similarly, federal law provides tax benefits to working individuals who make contributions to qualified retirement programs, such as individual retirement accounts (IRA) and 401(k) plans.[68] For example, working people who file joint tax returns may deduct contributions made to a retirement account on behalf of a spouse who is out of work.[69] Same-sex couples that are prevented from marrying in their home states,

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[66] 29 U.S.C. § 1055(a); *see also* 26 U.S.C. § 401(a)(11).

[67] No. CIV.A. 11-0045, 2013 WL 3878688 (E.D. Pa. July 29, 2013).

[68] 26 U.S.C. § 219.

[69] *Id.* §§ 25B(d)(2)(D), 408, 408A.

however, cannot take advantage of these tax benefits, and are thereby denied equal footing in saving for a secure retirement.

The divide furthers when one member of the couple dies. Surviving spouses of lawfully married couples are permitted to roll over a deceased spouse's IRA or 401(k) plan into their own account and to defer withdrawing funds from the account until they reach 70½ years of age.[70] By contrast, a partner in an unmarried same-sex couple who is designated as the beneficiary of the other partner's retirement account is required to commence withdrawing distributions by the end of the year following the year of death.[71]

II. Denying Same-Sex Couples the Right to Marry Inflicts Emotional and Psychological Harms on Their Children and on All LGBT Children

One professed justification for depriving same-sex couples of the right to marry is the advancement of the State's interest in caring for children.[72] *Amici* agree with the proposition that marriage—along with the panoply of accompanying benefits and rights we describe above—*does* promote caring for children. But what neither the states nor the Sixth Circuit decision below manage to explain is how that interest is advanced in any meaningful way by *withholding* marriage from same-sex couples.

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[70] *Id.* § 401(a)(9).

[71] *Id.*

[72] *See, e.g.*, Resp. Br. in Support of Pet. for Cert. at 27, *DeBoer v. Snyder* (No. 14-571).

At best, the states intimate that marriage is somehow unnecessary for same-sex couples because they, unlike different-sex couples, cannot conceive children by accident.[73] But, as we have already demonstrated, the denial of full marriage rights to LGBT couples has far-reaching consequences for the economic security and wellbeing of those couples and their families: their children may be denied legal ties to their parents; they face health coverage disparities and unequal access to health insurance; they are denied financial protections when a parent dies or is disabled; and they face higher tax burdens and obstacles in planning for their retirements. And, even when legal arrangements exist that can help mitigate some of these burdens—such as parental guardianship agreements or wills and estate planning—the expertise and resources necessary to obtain them are often out of reach for LGBT families.[74]

It is no wonder, then, that children being raised by same-sex couples are twice as likely to live in poverty as those being raised by married heterosexual parents.[75] State laws that withhold marriage from same-sex couples impose needless economic hardship on those families that can be severe and long-lasting. Innumerable studies have confirmed the link between poverty and adverse health and educational outcomes

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[73] *See id.*; Pet. App'x 34a.

[74] Movement Advancement Project et al., *Strengthening Economic Security for Children Living in LGBT Families* 8 (Jan. 2012), *available at* http://www.lgbtmap.org/file/strengthening-economic-security.pdf.

[75] *Id.* at 2-3.

for children.[76] So, far from being unnecessary, marriage is *essential* to the security and wellbeing of children living in LGBT families.

Denying same-sex couples the ability to marry harms children in other ways as well. *Amici's* members observe those harms first hand. *Amici* represent millions of workers who serve the nation's children in various capacities—as teachers, educational support professionals, education administrators, public school employees, bus drivers, childcare providers, doctors, nurses, and other healthcare workers. In these capacities, our members endeavor to ensure children in their care have a safe and supportive learning environment, provide for their successful and healthy development, and enhance their overall well-being. They regularly interact with the parents of these children, relaying information about a child's school or health status, seeking authorization or approval for various decisions about a child's medical treatment or education, and otherwise actively engaging a child's parents in the child's growth and development.

Research "convincingly shows" that LGBT couples

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[76] *See* Greg J. Duncan et al., *Boosting Family Income to Promote Child Development*, 24 THE FUTURE OF CHILDREN 99, 100 (2014) (describing the "cluster of disadvantages" to children that are associated with poverty), *available at* http://futureofchildren.org/futureofchildren/publications/docs/24_01_05.pdf; Patrice L. Engle & Maureen M. Black, *The Effect of Poverty on Child Development and Educational Outcomes*, 1136 ANNALS N.Y. ACAD. SCI. 243, 244 (2008) (observing that the "association between poverty and children's development and academic performance has been well documented"), *available at* http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1002&context=psycd_fac.

are just as capable at raising children as their heterosexual counterparts and that the children of those couples are just as likely to flourish in terms of educational and life outcomes.[77] Yet, as educators, caretakers, and advocates of children, our members recognize and experience first hand how bans on marriage between same-sex couples mandate discrimination and thereby "humiliate[] tens of thousands of children now being raised by same-sex couples" and "make[] it even more difficult for the[se] children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[78]

With statistics showing that more than a quarter of students feel they cannot participate fully in school because they have an LGBT parent, more than a third feeling that school personnel do not acknowledge that they are from an LGBT family, and a fifth feeling excluded from classroom activities because they have an LGBT parent,[79] the official discrimination against

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[77] *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 762-63 (E.D. Mich.) (district court's findings of fact), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015). *See also id.* at 762 ("Every major professional organization in this country whose focus is the health and well-being of children and families has reviewed the data on outcomes for children raised by lesbian and gay couples, including the methods by which the data were collected, and have concluded that these children are not disadvantaged compared to children raised in heterosexual parent households.").

[78] *Windsor*, 133 S. Ct. at 2694.

[79] Joseph G. Kosciw & Elizabeth M. Diaz, *Involved, Invisible, Ignored: The Experiences of Lesbian, Gay, Bisexual and Transgender Parents and Their Children in Our Nation's K-12 Schools* xvi (2008), *available at* http://www.familyequality.org/_asset/5n43xf/familiesandschools.pdf.

same-sex couples that these bans require on the part of teachers, school officials, and other childcare providers creates additional strain on these children. The same can be said for the provision of services by healthcare personnel, who may be forced into recognizing only one of a child's parents because of these bans. This forced discrimination hurts children; compromises the relationships between school personnel and other childcare or health providers, and the families and children they serve; and detracts from these professionals' ability to do their jobs efficiently and effectively.

Children who have LGBT parents are themselves targets of discrimination as well. This harassment starts as early as the elementary level, with eleven percent of elementary teachers reporting that students in their school were sometimes bullied or called names because they have an LGBT parent or other family member.[80] In a recent study, 40% of students from LGBT families reported that they had been verbally harassed in school because of their family, and 38% reported being verbally harassed because of their actual or perceived sexual orientation as a result of their LGBT family members.[81] These students also reported physical harassment (being pushed or shoved) or as-

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[80] GLSEN & Harris Interactive, *Playgrounds and Prejudice: Elementary School Climate in the United States* 31-32 (2012), *available at* http://www.glsen.org/sites/default/files/Playgrounds%20%26%20Prejudice.pdf.

[81] Joseph G. Kosciw et al., *2013 National School Climate Survey* xvi (2014), *available at* http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf.

sault (being punched, kicked, or injured with a weapon) because of their LGBT parent or family member (12%) or because of their actual or perceived sexual orientation (11%).[82] As a result, 23% of students felt unsafe at school because of their "family constellation," while 21% felt unsafe because of their actual or perceived sexual orientation.[83] Fifteen percent of these students who are harassed as a result of their LGBT family also report that they have skipped class at least one time, while 17% say they have missed at least one day of school because of safety concerns.[84]

In addition, bans on marriage between persons of the same sex encourage abusive behaviors by lending legitimacy to the view that discrimination on the basis of sexual orientation is socially acceptable. This has a marked impact on LGBT children. More than 55% of LGBT students felt unsafe at school because of their sexual orientation, 71.4% of LGBT students heard the word "gay" used in a negative way frequently or often at school, and 64.5% heard other homophobic remarks frequently or often.[85] Moreover, 74.1% of LGBT youth were verbally harassed, 32.6% were physically harassed, and 16.5% were physically assaulted in the last year because of their sexual orientation.[86]

This victimization of LGBT students has damaging effects on these students' education, health, and aca-

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[82] *Id.* at 56.

[83] *Id.* at 46.

[84] *Id.*

[85] *Id.* at xvi.

[86] *Id.* at 22-23.

demic future. More than 30% of LGBT students missed at least one day of school in the past month because they felt unsafe or uncomfortable, and more than 10% missed four or more days in the past month; those experiencing higher levels of victimization "[w]ere more than three times as likely to have missed school in the past month than those who experienced lower levels," while those experiencing *any* LGBT-related discrimination were more than three times as likely to have missed school in the past month than those who had not.[87] These absences result in a loss of instruction time and lost academic opportunities for these students. Given that, it follows sadly but predictably that the GPAs of these students experiencing higher levels of victimization because of their sexual orientation were lower than those students who were less often harassed (2.8 vs. 3.3), while students experiencing *any* LGBT-related discrimination "[h]ad lower GPAs than their peers (3.0 vs. 3.3)."[88] Those students experiencing higher levels of victimization were also twice as likely to report that they did not intend to pursue any post-secondary education as those who experienced lower levels of victimization.[89] LGBT students

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[87] *Id.* at xvi, xviii; *see also* Centers for Disease Control and Prevention, *Lesbian, Gay, Bisexual, and Transgender Health* ("According to data from CDC's YRBS, the percentage of gay, lesbian, and bisexual students (across sites) who did not go to school at least one day during the 30 days before the survey because of safety concerns ranged from 11% to 30% of gay and lesbian students and 12% to 25% of bisexual students."), *available at* http://www.cdc. gov/lgbthealth/youth.htm.

[88] *2013 National School Climate Survey*, *supra* note 81, at xviii.

[89] *Id.*

who are victimized or discriminated against also have higher levels of depression and lower levels of self-esteem.

It is not surprising that the second most common reason LGBT students plan to leave school or are uncertain about graduating is concern about academic achievement and actually meeting graduation requirements.[90] If a student feels unsafe at school and does not attend, she cannot maintain her grades, and if she cannot maintain her grades, she cannot satisfy graduation requirements. Likewise, almost as many LGBT students identified mental health struggles as a barrier to graduation, with many students noting that they suffered from anxiety or depression and some identifying "high levels of stress in the school environment."[91]

As the Centers for Disease Control explained, "[f]or youth to thrive in their schools and communities, they need to feel socially, emotionally, and physically safe and supported. A positive school climate has been associated with decreased depression, suicidal feelings, substance use, and unexcused school absences among [LGBT] students."[92] Having supportive staff is one of the primary ways to create this feeling of safety and security among LGBT students, and school staff "serve a vital role in creating an affirming learning environment" for these students.[93] In fact, students with

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[90] *Id.* at 43.

[91] *Id.* at 44.

[92] *Lesbian, Gay, Bisexual, and Transgender Health*, *supra* note 87.

[93] *2013 National School Climate Survey*, *supra* note 81, at 72.

many (eleven or more) supportive staff at their school were less likely to miss school because they felt unsafe or uncomfortable, felt more connected to their school community, had higher GPAs, and were less likely to not plan to attend college.[94]

Although the majority of education professionals (more than 80%) agree that they have an obligation to ensure a safe and supportive learning environment for these students,[95] discriminatory laws like the bans on marriage between same-sex couples challenged here institutionalize discrimination on the basis of sexual orientation, exacerbating the already difficult task education professionals and other childcare providers face in attempting to address and remedy the epidemic of bullying against gay and lesbian children or children with LGBT families. The message of these laws—namely, of second-class citizenship and state-sanctioned disapproval of the LGBT community—will continue to undermine their abilities to provide for secure and supportive environments for all of children they teach and care for, and it will have ongoing damaging effects on LGBT students and students from LGBT families.

CONCLUSION

For the reasons stated above, the judgment of the Sixth Circuit should be reversed.

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[94] *Id.* at xx-xxi.

[95] *Playgrounds and Prejudice*, *supra* note 80, at 87.

LYNN K. RHINEHART
H. CRAIG BECKER
American Federation of
Labor-Congress of
Industrial Organizations
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5397

ALICE O'BRIEN
(Counsel of Record)
JASON WALTA
KARI GREENWOOD
National Education
Association
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 822-7035

JUDITH A. SCOTT
NICOLE G. BERNER
Service Employees
International Union
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 730-7455

PATRICK J. SZYMANSKI
Change to Win
1900 L Street, N.W.
Washington, D.C. 20036
(202) 721-6035